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No. 89-994

IN THE

Supreme Court of the United States

October Term, 1989

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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RULE 29.1 LISTING

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ARGUMENT

I.
42 U.S.C. § 1988 Must Be Construed To Give Full Effect To Congress' Purpose Of Encouraging Private Enforcement Actions Under The Civil Rights Statutes By Authorizing Fully Compensatory Fee Awards.

Seizing upon the fact that 42 U.S.C. § 1988 does not contain the words "experts' fees," the Pennsylvania defendants argue that experts'

fees may not be included in awards made under § 1988. However, such a result is contrary to Congress' intent to provide a full and complete remedy that pays what it costs to bring a civil rights enforcement action. Because the Pennsylvania defendants studiously avoid any explanation of how the exclusion of experts' fees is consistent with Congress' purpose in enacting the fee shifting provision of § 1988, West Virginia University Hospitals, Inc. (hereinafter referred to as "WVUH"), respectfully submits that each of the Pennsylvania defendants' arguments should be rejected.

A. The Language Of 42 U.S.C. § 1988 Does Embrace Awards Of Fees For Experts.

The Pennsylvania defendants repeatedly argue that the plain meaning of 42 U.S.C. § 1988 does not countenance awards of fees for experts. See, e.g., Brief of Respondents at 18. They are wrong.

The phrase "reasonable attorney's fee" is a term of art that is well understood by legislators and civil rights litigators to encompass experts' fees, paralegals' fees, and other fees beyond those generated personally by an attorney. See H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1808 ("The conferees intend that the term 'attorneys' fees as part of the costs' [in 20 U.S.C. § 1415(e)(4)(B)] include reasonable expenses and fees of expert witnesses . . . ."); see also Missouri v. Jenkins, 491 U.S. ___, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989) (paralegals' fees are compensable under § 1988). Indeed, when Representative Drinan, who sponsored the Civil Rights Attorney's Fees Awards Act, discussed the bill, he clearly indicated that the phrase "reasonable attorney's fee" went beyond fees generated by attorneys themselves: "the phrase 'attorney's fee' would include . . . . all incidental and necessary expenses incurred in furnishing effective and competent representation." 122 Cong. Rec. 35,123 (1976) (emphasis added). Further evidence of Congress' intent to allow reimbursement of experts' fees under § 1988 can be found in the express endorsement of pre-Alyeska caselaw awarding experts' fees under similarly-worded civil rights fee shifting statutes. See, e.g., S. Rep. No. 1011, 94th

Cong., 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & Admin. News 5911, 5913 (citing Davis v. County of Los Angeles, 8 Fair Empl. Prac. Cas. (BNA) 244, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974)). Thus, 42 U.S.C. § 1988 not only can be read to include awards of experts' fees,[1] it should be so read because it contains fee shifting language that has an established meaning encompassing awards of experts' fees.

B. Congress' Clear Intention Takes Precedence Over The Plain Language Of A Statute.

Even if the phrase "reasonable attorney's fee" were not a term of art, the plain words of the statute would not take precedence over Congress' clear legislative intention. This Court has repeatedly reaffirmed the vitality of this principle. E.g., Green v. Bock Laundry Machine Co., 490 U.S. ___, 109 S. Ct. 1981, 104 L. Ed. 2d 557 (1989); Church of the Holy Trinity v. United States, 143 U.S. 457 (1892); Pennington v. Coxe, 6 U.S. (2 Cranch) 33 (1804).

Although § 1988 does not contain the words "experts' fees," this narrow focus of literality does not adequately illuminate the controlling issue of Congress' intent. In the case of § 1988, three facts underlying the legislation irrefutably demonstrate that Congress intended a broader form of fee relief than that advocated by the Pennsylvania defendants.

First, prior to the announcement of Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), federal courts commonly awarded experts' fees when they awarded attorneys' fees pursuant to their then-presumed equitable powers. See Brief of Petitioner at 18 n.15 (citation of pre-Alyeska cases where courts awarded experts'

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1 Nothing in § 1988 prohibits experts' fee awards or is inherently antithetical to them.

fees). This Court has recognized that the historical prelude to the enactment of a statute is a critical factor to consider in interpreting the statute. See, e.g., Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963); Church of the Holy Trinity, 143 U.S. at 462-63.

Secondly, after Alyeska's announcement, Congress acted quickly and decisively to abrogate Alyeska's effects upon civil rights litigation. Concerned with "effective access to the judicial process," H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976), Congress wanted, in particular, to insure that civil rights litigants "have the means to go to court, and to be effective once they get there." 122 Cong. Rec. 33,313 (1976) (statement of Sen. Tunney). Congress clearly recognized that, "[i]f the cost of private enforcement actions becomes too great, there will be no private enforcement." S. Rep. No. 1011, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5913. These and other indications of Congress' intent establish that Congress wanted to restore to the courts their pre-Alyeska practices, which included expert fee awards as a part of awards of attorneys' fees. Congress wanted to "remedy [the] anomalous gaps in our civil rights laws created by . . . Alyeska." Id. at 1, reprinted in 1976 U.S. Code Cong. & Admin. News at 5909.[2] Nothing in Congress' enactment of § 1988's fee shifting provision suggests that it intended only a partial nullification of Alyeska in the area of the civil rights litigation.[3]

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2 Reinstatement of the federal courts' pre-Alyeska practices by eliminating the "anomalous gaps" is consistent with not only an intent to overturn Alyeska but also Congress' historical practice of supplying broad civil rights remedies. Indeed, WVUH submits that this conclusion is far more reasonable than the one advanced by the Pennsylvania defendants, who argue that Congress did not fill in all of the anomalous gaps despite its stated intentions to do so. Congress did not act in a piecemeal fashion contrary to its stated goals, but rather it acted to eliminate all of Alyeska's effects upon civil rights litigation.

3 Congress' speed in enacting the fee shifting provision of 42 U.S.C. § 1988 is noteworthy and supports the conclusion that Congress perceived a substantial need to overturn Alyeska in its entirety in the area of civil rights litigation. Several legislators and witnesses remarked upon the need for expeditious action

Thirdly, a failure to pay experts' fees is fundamentally contrary to Congress' articulated purpose of creating a "full and complete" remedy that would pay "what it costs" to bring private enforcement actions. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976); S. Rep. No. 1011, 94th Cong., 2d Sess. 2, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910. In fact, the Pennsylvania defendants' narrow construction of § 1988 frustrates Congress' purpose because it would deny a successful civil rights plaintiff reasonable compensation for experts needed to prove the plaintiff's case, i.e., "what it costs" to prevail. "Plain meaning" is only an axiom of construction, not a rule of law, see Watt v. Alaska, 451 U.S. 259, 266 (1981), and it should not be allowed to become an ultimate weapon of statutory destruction.

In appropriate cases like this one, this Court has rejected "plain meaning" constructions, agreeing with Judge Learned Hand that:

> "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

Public Citizen v. United States Department of Justice, 491 U.S. ___, 109 S. Ct. 2558, 2566, 105 L. Ed. 2d 377, 392 (1989) (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945)).

(continued)

by Congress. This backdrop of urgency to § 1988's amendment and the concomitant lack of dispute or legislative compromise are consistent with the observation that Congress was not acting with precision on a number of finite issues affected by Alyeska but rather was striving to return as quickly as possible to the pre-Alyeska status quo, which did, in fact, include awards of experts' fees. See Brief of Petitioner at 18 n.15.

Indeed, this Court has already rejected a literal construction of § 1988, Missouri v. Jenkins, and has a long tradition of rejecting plain meaning constructions in the civil rights area when the historical context of civil rights statutes indicated that Congress did not intend a literal reading. See, e.g., Hensley v. Eckerhardt, 461 U.S. 424, 429 n.2 (1983); Briscoe v. Lahue, 460 U.S. 325 (1983); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Consistent with these authorities, the Seventh Circuit concluded that § 1988 authorized awards of experts' fees. Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir. 1989), petition for cert. filed, 58 U.S.L.W. 3505 (U.S. Jan. 29, 1990) (No. 89-1230).

Because statutes are "purposive utterances" and because "language is a slippery medium in which to encode the purpose," id., courts must read the statute to bring about the end the Congress would have specified had Congress "thought about it more clearly or used a more perspicuous form of words."[4] Id.; see Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) ("It is a commonplace that courts will further legislative goals by filling the interstitial silences within a statute or a regulation. Because legislators cannot foresee all eventualities, judges must decide unanticipated cases by extrapolating from related statutes or administrative provisions."); see also 2A Sutherland Stat. Const. § 45.09 at 41 (4th ed. 1984) (Judge Robert E. Keeton's four-step analysis of statutory construction). As Judge Posner noted, this is not judicial usurpation but "interpretation in a sense that has been orthodox since Aristotle." 888 F.2d at 514.

Accordingly, while, in hindsight, one might criticize Congress for its failure to use a "more perspicuous form of words," id., that criticism does not justify restricting § 1988's reach in contradiction of Congress' purpose. To restrain § 1988 is to reduce Congress' power to legislate effectively. That is not this Court's function; instead this Court should aid in the achievement of Congress' goals.

C. Congress' Explicit Inclusion Of Experts' Fees In Other Statutes Does Not Compel The Conclusion That Experts' Fees Are Not Compensable Under 42 U.S.C. § 1988.

The Pennsylvania defendants correctly point out that, in a number of other fee shifting statutes, Congress explicitly authorized experts' fees. See Brief of Respondents at 35-36 and n.9. Thus, they argue that Congress must have intended to exclude awards of experts' fees when it enacted § 1988 without any explicit reference to such fees.

The Pennsylvania defendants' argument rests entirely on the proposition that Congress will always use the term "experts' fees" when it intends such fees to be compensable. This proposition, however, is untenable. Congress has made it clear in other fee shifting statutes that it intends the term "reasonable attorneys' fees" to include experts' fees. H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1808 (concerning 20 U.S.C. § 1415(e)(4)(B)). Therefore, Congress' failure to use the words "experts' fees" by no means constitutes an exclusion of such fees.

Furthermore, this Court has held that omission of particular words in a fee shifting statute may not be a basis for thwarting Congress' purpose. In Pennsylvania v. Delaware Valley Citizens' Council for

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4 The Pennsylvania defendants mistakenly state that experts' fees were not mentioned in the legislative history of § 1988's fee shifting provision. See Brief of Respondents at 41. Some witnesses did refer to compensation of experts. E.g., Awarding of Attorney's Fees: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess. 1, 89 (1975) (prepared statement of M.F. Derfner, stating in support of awards of attorney's fees that "because of the limited resources available to [attorneys] in public interest cases, they are rarely able to afford the technical assistance of expert witnesses"). However, Congress apparently saw no reason to be more explicit, presumably because the term "reasonable attorney's fee" was a term of art with an established meaning encompassing experts' fees. See id. at 91 n.9 (antidiscrimination fee shifting provisions normally contain identical language); see also Section I.A. supra. WVUH is aware of no expression of Congressional intent to prohibit the compensation of experts' fees under § 1988.

Clean Air, 478 U.S. 546 (1986), the Court confronted the issue of whether the expenses of administrative proceedings were embraced by the fee shifting provisions of the Clean Air Act, 42 U.S.C. § 7604(d).

The Commonwealth of Pennsylvania, in arguing for a limited construction of § 7604(d), contrasted that statute's "costs of litigation (including reasonable attorney and expert witness fees)" in "any action" to § 1988's authorization for a "reasonable attorney's fee" in "any action or proceeding." Pennsylvania argued that the omission of the word "proceeding" from § 7604(d) was important and signified that Congress did not intend the Clean Air Act's fee shifting provision to be as broad as § 1988's remedy.

The Court refused to attach such significance to the minor differences in terminology between the two statutes. Instead, the Court concluded that Congress' purposes behind both § 1988 and § 7604(d) were "nearly identical, which lends credence to the idea that they should be interpreted in a similar manner," irrespective of their distinctions in drafting. 478 U.S. at 559. In reaching this conclusion, the Court noted § 1988's purpose of fostering private enforcement actions. Id. at 560. Importantly, after finding that the Clean Air Act's fee shifting provision had a nearly identical purpose, the Court's analysis turned upon the fact that participation in administrative proceedings was "crucial" to the vindication of the rights of environmental groups, id. at 561, and "necessary to the attainment of adequate relief." Id. at 558.

The same analysis is appropriate within the context of § 1988 and experts' fees. Just as the absence of an explicit reference to a "proceeding" does not control the proper interpretation of § 7604(d), the absence of an explicit reference to "experts' fees" in § 1988 should not control the proper interpretation of § 1988. Indeed, as a broader statutory remedy in a more important substantive area of the law, § 1988 logically must include compensation for the experts' fees expressly embraced by § 7604(d).

The district court in this case found WVUH's experts to be "essential" to the district court's decision.[5] See Pet. App. at C-2. Such a finding of indispensability is consistent with the holding in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air that costs "crucial" to the enforcement of the Clean Air Act are compensable under the Clean Air Act's similarly-worded fee shifting provision. Therefore, as stated by this Court, both § 1988 and § 7604(d) "should be interpreted in a similar manner," 478 U.S. at 559, which means that the costs of WVUH's "essential" experts should be reimbursed.

In a similar vein, Sullivan v. Hudson, 490 U.S. ___, 109 S. Ct. 2248, 104 L. Ed. 2d 941 (1989), rejected a plain meaning construction of the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (hereinafter referred to as the "EAJA"). That case dealt with whether the costs of administrative proceedings under the Social Security Act were compensable under the EAJA. The Federal Government argued that they were not because the EAJA was limited to a "civil action" which excludes any non-judicial forum. 109 S. Ct. at 2257, 104 L. Ed. 2d at 954.

Again, the basis for the Court's rejection of a "plain meaning" construction of the EAJA was the conclusion that administrative proceedings were "crucial" to the vindication of the rights to be enforced. Id., 109 S. Ct. at 2256, 104 L. Ed. 2d at 953. The Court analyzed the situation by pointing out that the failure to pay for a "crucial" part of an enforcement action would be "anomalous" and

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5 Prior to its decision in this case, the Third Circuit had held that experts' fees were compensable under § 1988 if the court concluded the experts were indispensable to the case. See Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201, 204-06 (3d Cir. 1981).

would frustrate the EAJA's purpose. In an apt analogy, the Court characterized the effects of a plain meaning construction of the EAJA as a "lifeline that . . . was a foot short." Id., 109 S. Ct. at 2256, 104 L. Ed. 2d at 954. The same can be said with respect to the Pennsylvania defendants' construction of § 1988.

Although the Pennsylvania defendants rely heavily upon the EAJA because it explicitly authorizes experts' fees, see Brief of Respondents at 34-35, the EAJA is, in actuality, more evidence of the breadth of § 1988's remedy. In enacting the EAJA, Congress clearly intended that the EAJA would be more limited in its awards than § 1988. The legislative history noted that the EAJA would not control where other fee shifting statutes were applicable. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18, reprinted in 1980 U.S. Code Cong. & Admin. News 4984, 4997. Specifically, the House Report stated that the EAJA was not intended to replace or supersede any statute like § 1988 "in which Congress has indicated a specific intent to encourage vigorous enforcement, or to alter the standards or the case law governing [§ 1988]." Id. That fact is reflected in 28 U.S.C. § 2412(d)(1)(A)'s initial language "[e]xcept as otherwise specifically provided by statute . . . ." Thus, Congress clearly contemplated situations where both the EAJA and other fee shifting statutes like § 1988 might be applicable, and it provided that § 1988 would take precedence in that event.

The precedence of § 1988 over the EAJA makes sense because the EAJA is a limited remedy. For example, a party must not only prevail, but he must also show that the position of the United States was not "substantially justified." 28 U.S.C. § 2412(d)(1)(A). In addition, fees for attorneys and for experts are capped (albeit by different methods). 28 U.S.C. § 2412(d)(2)(A). Moreover, prevailing parties who have resources over $2,000,000.00 do not qualify for a fee award under the EAJA. 28 U.S.C. § 2412(d)(2)(B).

While Congress intended to foster enforcement actions with the EAJA, it is clear that its intent was not to provide fees for every prevailing party or to pay all of the fees charged to a prevailing party by his attorneys or experts. In short, the EAJA does not provide for a

"full and complete" remedy as does § 1988.[6] Thus, Congress' express inclusion of experts' fees in the EAJA cannot be read to exclude experts' fees from § 1988, the broader statute.[7]

Consequently, the sweeping proposition of statutory construction advanced by the Pennsylvania defendants must be rejected. It is inaccurate to say that Congress' inclusion of explicit provisions concerning experts' fees in one fee shifting statute, even one with a similar purpose, automatically excludes them in another fee shifting statute that does not contain the same degree of explicitness. Therefore, the Pennsylvania defendants' argument about Congress' express inclusion of experts' fees in twenty-six statutes is not a valid basis for a construction of § 1988 that excludes compensation for experts' fees. Instead, § 1988 should be interpreted in light of its stated purpose of providing a "full and complete" remedy to pay "what it costs" to enforce civil rights.

D. Any Construction Of 42 U.S.C. § 1988 Must Avoid An Absurd Or Anomalous Result.

The Pennsylvania defendants' construction of § 1988 not only frustrates Congress' manifest purpose but produces an "odd result" which demands a more reasonable construction. Green v. Bock

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6 Indeed the legislative history of the EAJA suggests that Congress' motive in enacting the EAJA was to discourage government agencies from persisting in non-meritorious litigation, which is a far different intention than the one behind § 1988. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9-10, reprinted in 1980 U.S. Code Cong. & Admin. News 4984, 4988-89.

7 Another interesting contrast between the EAJA and § 1988 is their respective lengths. The EAJA is far more lengthy than is § 1988's fee shifting provision and provides far more detail. Congress obviously wished to achieve only certain limited goals in the EAJA, which, therefore, required more precise drafting than is found in § 1988. Again, this difference supports WVUH's contention that Congress acted broadly in § 1988 and that "reasonable attorney's fee" is a form of shorthand for what it costs to prevail.

Laundry Machine Co., 109 S. Ct. at 1984, 104 L. Ed. 2d at 564; see also id., 109 S. Ct. at 1994, 104 L. Ed. 2d. at 575 (Scalia, J., concurring).

The Pennsylvania defendants contend that experts' fees may be awarded only pursuant to those statutes in which Congress specifically recites the phrase "expert witness fees." E.g., 15 U.S.C. § 2805(d)(1)(C) (Petroleum Marketing Practices Act). Thus, under the Pennsylvania defendants' interpretation of the various federal fee shifting statutes, experts' fees may be compensated in the case of some statutory violations but never in the case of a constitutional violation, such as the Fourteenth Amendment violation found by the district court in this case. See Pet. App. at B-49 to B-53. Such a construction turns logic and reason inside out by making a constitutional violation less worthy of vindication than a statutory violation. While federal statutes typically involve important national policies, they do not rise to the level of our basic constitutional rights. Therefore, a broad construction of § 1988, a civil rights fee shifting statute, is in order.

In certain respects, the odd result advocated by the Pennsylvania defendants is analogous to the example of an absurd law, noted by three members of this Court in another case. That absurd law prohibited the drawing of blood in the streets by a physician who comes to the aid of an injured person. Public Citizen v. United States Department of Justice, 109 S. Ct. at 2574-75, 105 L. Ed. 2d at 402 (Kennedy, J., Rehnquist, C.J., and O'Connor, J., concurring). In the context of § 1988, the injured person can clearly have his attorney assist him with his lawsuit, but to what avail if an expert, who is vital to the proof of his case, cannot assist him? Thus, just as an injured man may lose his life in the street because a physician cannot come to his aid with necessary treatment, the civil rights plaintiff may lose his case because an expert cannot provide necessary advice and/or testimony.

To avoid this absurdity and to honor Congress' intent and, indeed, its long tradition of broad remedies in the civil rights area, the arguments advanced by the Pennsylvania defendants about § 1988's

"plain meaning" must be rejected. If the Pennsylvania defendants eschew "snippets" of legislative history, then they should at least be willing to recognize the sequence of events leading to the enactment of the fee shifting provision of § 1988: (1) pre-Alyeska practice included awards of experts' fees; (2) Alyeska stopped the practice; and (3) Congress, intending a "full and complete" remedy, quickly restored the pre-Alyeska practice by amending § 1988. Thus, when Congress enacted § 1988's fee shifting provision, it painted with the broad brush of a house painter, not with the fine palette brush of a portraitist. Accordingly, this Court should continue interpreting § 1988 in a manner consistent with its purpose. See Missouri v. Jenkins.

II.
Federal Rule of Evidence 706 Is Not A Substitute For A Full And Complete Fee Award Under 42 U.S.C. § 1988.

The Pennsylvania defendants recognize that the Third Circuit's opinion concerning experts' fees harms and deters civil rights litigants by denying them a full and complete remedy, i.e., one that includes reimbursement for experts. To mitigate this mischief they argue that experts can be appointed by the court under Fed. R. Evid. 706, at least where there are "worthy and impecunious litigants," and that the court can assess the experts' fees against the other party. See Brief of Respondents at 45. This argument is not valid.

First, the protection of civil rights is not within the exclusive province of either the rich or the poor. The entire history of the enforcement of civil rights demonstrates that any person, regardless of his fortune, has the right to enforce his rights and to obtain the relief to which he is entitled. The vindication of civil rights by either a rich man or a poor man benefits both; each is entitled to a full and complete remedy. Therefore, the Pennsylvania defendants' argument that Fed.

R. Evid. 706 is a remedy for at least the "worthy and impecunious" litigant misses the high mark of civil rights enforcement.[8]

The courts have recognized that Fed. R. Evid. 706 is not the panacea suggested by the Pennsylvania defendants. Experts appointed by a court pursuant to Fed. R. Evid. 706 are by no means the functional equivalent of experts selected by a party. See Kaufman v. Edelstein, 539 F.2d 811, 818 (2d Cir. 1976) ("The situation of the court appointed expert . . . differs utterly from that of an expert called by a party . . . ."). Fed. R. Evid. 706 experts are appointed when the court needs assistance comprehending complex and/or technical issues central to the dispute.[9] See, e.g., Students of California School for the Blind v. Honig, 736 F.2d 538, 549 (9th Cir. 1984), vacated on other grounds, 471 U.S. 148 (1985); Gates v. United States, 707 F.2d 1141, 1144 (10th Cir. 1983).

Fed. R. Evid. 706 is a Sword of Damocles that the court may employ to ensure that the parties' experts remain accurate in their testimony:

> The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

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8 WVUH is also concerned with the suggestion that an indigent litigant must also be "worthy." The concept of the "worthy poor" was rejected as a matter of national policy many years ago as one that is fundamentally unfair. See King v. Smith, 392 U.S. 309, 320 (1968). If the Pennsylvania defendants are seriously suggesting a return to that concept, then that is but another basis for rejecting their argument about Fed. R. Evid. 706.

9 The intention to use court-appointed experts to assist the factfinder with complex issues is reflected by the citations to Scott v. Spanjer Brothers, Inc., 298 F.2d 928 (2d Cir. 1962), and to Danville Tobacco Association v. Bryant-Buckner Associates, Inc., 333 F.2d 202 (4th Cir. 1964), in Fed. R. Evid. 706 advisory committee's note.

Fed. R. Evid. 706 advisory committee's note. Thus, experts are appointed only rarely under Fed. R. Evid. 706 in order to provide the court with some assurance of impartiality. See United States v. Green, 544 F.2d 138, 145 (3d Cir. 1976), cert. denied, 430 U.S. 910 (1977); Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. 1304, 1312 (S.D.N.Y. 1981). Nothing in Fed. R. Evid. 706 suggests that courts may routinely use Fed. R. Evid. 706 to appoint experts for civil rights litigation.

Indeed, in United States Marshals Service v. Means, 741 F.2d 1053 (8th Cir. 1984), a case cited by the Pennsylvania defendants, the court made clear that Fed. R. Evid. 706 is invoked only under "compelling" circumstances. Id. at 1059; accord Fed. R. Evid. 706 advisory committee's note ("actual appointment [of court-appointed experts] is a relatively infrequent occurrence").[10] Again, vigorous civil rights enforcement is not intended only for the indigent. Thus, Fed. R. Evid. 706 is not a soothing balm to the injury caused by the Third Circuit's limited construction of § 1988 in this case.

Furthermore, reliance on Fed. R. Evid. 706 does not address the need for pretrial access to experts. Under the Pennsylvania defendants' argument, a worthy and impecunious person seeking to vindicate his rights must first file suit before he can obtain the services of an expert. Thus, ill-prepared lawsuits must be brought to get needed access to experts. Badly prepared lawsuits merely expend the resources of the courts and litigants needlessly, and, more importantly, they do not facilitate a just resolution of the dispute.

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10 While Fed. R. Evid. 706 is intended to be invoked only rarely, the amicus in support of the respondents concedes that "litigation under the various discrimination and civil rights statutes . . . often involve[s] expensive statistical analyses by experts." Brief Of Amicus Curiae The Equal Employment Advisory Council at 7. Experts, therefore, are regularly crucial to private enforcement actions. Fed. R. Evid. 706 was not designed to bear this type of burden as a routine part of litigation.

Lastly, the Pennsylvania defendants state that court appointment of experts may be accomplished "under the rubric of the Court's 'inherent power' to tax expert witness fees through prior approval." Brief of Respondents at 44. This statement implies that a civil rights litigant is not truly disadvantaged by the Third Circuit's ruling in this case because, after all, he can apply to the court's inherent discretion.

The Pennsylvania defendants may not in one breath rely upon Alyeska and Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987), as limitations on the courts' inherent authority, and then in another breath assert that civil rights litigants will not be harmed because the courts still possess sufficient authority to tax the costs of experts. If this argument about inherent authority is correct, then WVUH submits that the district court in this case has already awarded experts' fees, and the Third Circuit erred in doing anything more than reviewing the district court's decision for an abuse of discretion.

III.

An Extension Of Crawford Fitting Co. v. J. T. Gibbons, Inc., *Is Not Warranted Because It Would Contradict Congress' Intent.*

The Pennsylvania defendants urge the Court to extend Crawford Fitting Co. v. J. T. Gibbons, Inc., to expert fee awards under § 1988. By contrast, they also urge the Court to find Missouri v. Jenkins inapplicable. Thus, the Pennsylvania defendants argue that a non-§ 1988 case ought to control and a § 1988 case ought not to control. This argument is unpersuasive.

Crawford concerned two statutes of general application to litigation. Regardless of the nature of the claims in a particular lawsuit, 28 U.S.C. § 1821 and 28 U.S.C. § 1920 will normally control absent a more specific, applicable statute.

The modest costs allowed by § 1821 and § 1920 by no means rise to the magnitude of fee shifting that is contemplated by § 1988 or the other fee shifting statutes Congress has enacted for particular

programs. Thus, although § 1821 and § 1920 permit some limited fee shifting, they are generally consistent with the American Rule, which requires each litigant to bear his costs.

The Crawford analysis is, therefore, one concerned principally with the American Rule's antagonism to fee shifting. Such an analysis, however, is totally inapposite when a statute more specific than § 1821 and § 1920 comes into play and authorizes more than limited fee shifting.[11]

A more specific fee shifting statute, like § 1988, must be analyzed consistently with Congress' intent to provide for a full and complete remedy which, perforce, displaces totally the policy embodied in the American Rule and in § 1821 and § 1920 and, with it, the Crawford analysis. Accordingly, the focus cannot be upon Crawford, or upon § 1821, or § 1920 because, very simply, they are not § 1988. In this case, § 1988 is the statute at hand, and that statute alone is relevant to the question presented.

As to that inquiry, Jenkins is immediately relevant because it concerned § 1988, not § 1821, or § 1920, or Fed. R. Civ. P. 54(d). To argue differently suggests Jenkins was either wrongly decided or must be distinguished into an irrelevant footnote to federal statutory history.

Jenkins demonstrates that this Court does not apply the "plain meaning" rule mechanically to § 1988 and, thereby, fail to implement entirely the policy developed by Congress. Jenkins clearly stands for

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11 No question or issue about an implied repeal of either § 1821 or § 1920 exists. Section 1821(a)(1) clearly states that it applies "[e]xcept as otherwise provided by law," and § 1988 otherwise provides. Thus, § 1821 and § 1920 remain on the books as effective statutes, but, in civil rights litigation, a more specific statute, i.e., § 1988, controls, just as § 1821 and § 1920 control the more general provisions of Fed. R. Civ. P. 54(d). See Crawford Fitting Co. v. J. T. Gibbons, Inc.

the proposition that "reasonable attorney's fee" in § 1988 is not limited to the fee generated by an attorney personally. Instead, this Court, recognizing Congress' great purpose in § 1988, interpreted § 1988 so as to achieve Congress' goal and to avoid the absurd situation where an attorney would be encouraged to take on tasks that are better and more efficiently suited to non-attorneys.

Under Jenkins, paralegals' fees are compensable in an award of attorneys' fees because they are necessary to a full and complete remedy. The same can be said about experts' fees. Indeed, the work of experts is often more "crucial" to the success of litigation than is the work of paralegals. Furthermore, compensation for experts, like compensation for paralegals, serves the same purpose of encouraging attorneys to delegate tasks to non-attorneys who can more efficiently and economically perform that work.

Other than, perhaps, the educational and experiential background of experts and paralegals, the only distinction to be drawn between experts and paralegals is the fact that the latter are under contract to the attorney and the former usually are not. However, that distinction could easily be eliminated by having attorneys retain their clients' experts. Thus, WVUH concludes that the employment relationship between an attorney and an expert is not a meaningful one, and, consequently, it is not one that should be a basis for distinguishing Jenkins.

Because Jenkins cannot be persuasively distinguished, it is determinative of the question presented in this case. On the other hand, Crawford can be distinguished easily because it does not concern either § 1988 or the creation of a full and complete remedy. Instead, Crawford deals with two statutes that do not apply if other fee shifting statutes exist. Thus, Crawford is not controlling and ought not be extended beyond its stated limits. To so extend it would judicially engraft an unintended limitation upon the Congressional policy of a full and complete remedy under § 1988.

CONCLUSION

The bedrock of the Pennsylvania defendants' position is that § 1988 does not contain the words "experts' fees." However, rather than constituting a starting place for the inquiry into § 1988's proper construction, the Pennsylvania defendants would have it also constitute the stopping place. The inquiry cannot end so quickly, for to do so would ignore the established meaning of the phrase "reasonable attorney's fee" in civil rights fee shifting statutes, would frustrate Congress' manifest purpose, and would lead to an absurd and illogical result.

Congress, when it enacted the fee shifting provision of § 1988, had a broad purpose in mind. While Congress may not have had the prescience with which to identify every conceivable issue that could arise under § 1988, that does not mean courts are required to adopt limiting constructions for fear of thwarting Congress' goals or interfering with its prerogatives. Limiting the construction of statutes because Congress failed to state explicitly everything it sought to do is neither a cautious nor a wise approach. Instead, it is a disavowal of the judicial obligation to interpret a statute so as to implement Congress' policy.

Failure to effect fully what Congress intended is also judicial emasculation of the legislative powers of the Congress, a co-equal branch of government. As a result, it is constitutionally impermissible. The Court must accord Congress its full powers and perquisites by adopting constructions that achieve Congress' purposes, not shortstop them.

Accordingly, West Virginia University Hospitals, Inc., requests: (1) a reversal of the opinion and judgment of the United States Court of Appeals for the Third Circuit concerning the award of experts' fees; (2) a reinstatement of the District Court's award of experts' fees; and (3) an order directing the Court of Appeals to recalculate its award of attorneys' fees to West Virginia University Hospitals, Inc., to include compensation for time spent on the experts' fees issues before that

court. West Virginia University Hospitals, Inc., further prays for an award of reasonable attorneys' fees and costs attendant to this appeal.

Respectfully submitted,

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